MUNICIPAL LIABILITY NEWSLETTER

March 2017

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Welcome to the March 2017 issue of the Gallagher Sharp Municipal Liability Newsletter. This issue looks at 42 U.S.C. §1983 malicious prosecution claims, focusing on witness immunity and recent United States Supreme Court and Sixth Circuit case law, then reviews two recent Ohio Supreme Court decisions affecting police officers.

42 U.S.C. §1983 Malicious Prosecution Claims and Immunity for Grand Jury Testimony

Many of the 42 U.S.C. §1983 suits we defend for police officers contain malicious prosecution claims. The Sixth Circuit outlined four elements that a plaintiff must prove for a §1983 malicious prosecution claim in *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010): (1) a criminal prosecution was initiated against the plaintiff, and the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty, as understood under Fourth Amendment jurisprudence, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.

As a general rule, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause" for a prosecution. This defeats the second requirement for an actionable claim, which requires a lack of probable cause. *Higgason v. Stephens*, 288 F.3d 868 (6th Cir. 2002). But the Sixth Circuit developed an exception to the *Higgason* rule when a defendant knowingly or recklessly presents false testimony to the grand jury to obtain the indictment. *See Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017).

A plaintiff may base an actionable malicious prosecution claim on an officer falsifying an affidavit or lying to the prosecutor during the investigation of the case. *See Sanders.* However, case law is clear that a malicious prosecution claim against an officer may not be based on trial testimony. In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the United States Supreme Court held that "in litigation brought under 42 U.S.C. § 1983 all witnesses – police officers as well as lay witnesses – are absolutely immune from liability based upon their testimony in judicial proceedings." This is because without absolute immunity a witness may be "reluctant to come forward to testify" or once on the stand, the witness might withhold or "shade his testimony" out of fear of a subsequent lawsuit.

The Supreme Court extended this holding to provide absolute immunity to police officers' testimony at a grand jury proceeding in *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012), where the Court explained that the justification for absolute immunity for trial witnesses applies with equal force to grand jury witnesses: in both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence.

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This raises a possible contradiction – if a police officer has absolute immunity for grand jury testimony, how can a plaintiff prove the exception to the *Higgason* rule, that the officer knowingly or recklessly presented false testimony to a grand jury to obtain an indictment?

If a police officer has absolute immunity for grand jury testimony, how can a plaintiff show an exception to the Higgason rule, that the officer knowingly or recklessly presented false testimony to a grand jury to obtain an indictment?

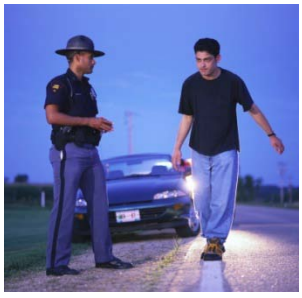
The Sixth Circuit cleared this up in *Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017), finding that *Rehberg* barred the malicious prosecution claim because the plaintiff could not rebut the indictment's presumption of probable cause without using the officer's grand jury testimony.

In that case a confidential informant provided an officer, Jones, with a grainy video of a controlled drug buy. Jones testified before a grand jury that Sanders was the person in the video. The grand jury indicted, but the case was later dropped. (Jones conceded in a subsequent deposition that the person in the video was not in fact Sanders.) Sanders brought a malicious prosecution claim against Jones. The trial court denied summary judgment, reasoning that Jones was not entitled to absolute immunity because the claim was based in part on his investigative conduct leading up to the grand jury proceeding, namely the police report stating that Sanders was the person in the video.

The Sixth Circuit reversed and remanded in favor of Jones. The court noted that a plaintiff who has been indicted may only overcome the presumption of probable cause by evidence that the defendant made false statements to the grand jury, and that false statements made in police reports or to a prosecutor do not count. The court explained that "*Rehberg* effectively defeats Sanders's malicious prosecution claim based on the allegedly false police report because she cannot overcome the presumption of probable cause without using Jones's absolutely immune grand jury testimony." The court went on: "While this application of *Rehberg* may seem harsh in largely foreclosing malicious prosecution claims where the plaintiff was indicted, it is consistent with our original approach to malicious prosecution claims. And that approach protects another important interest: the integrity of the judicial system."

Supreme Court of Ohio

Police Officer's Testimony is Sufficient Evidence That a Driver was Under the Influence of a Painkiller



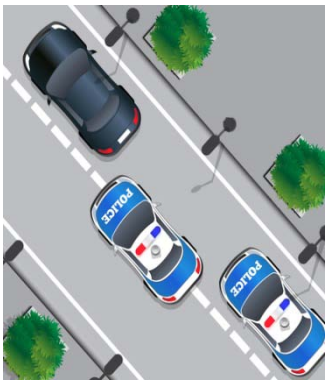
Richardson rear-ended a stopped car at a red light. After the collision, the other driver noticed that Richardson's speech was slurred, and Richardson dropped all of his cards when they were exchanging information. A Dayton police officer arrived on the scene, approached Richardson, and noticed that he tried to light a cigarette but succeeded only in singeing his hair. The officer administered field sobriety tests, which Richardson failed, and asked for a blood test, which Richardson refused.

Richardson was arrested for OVI. At trial Richardson testified that he had a hydrocodone prescription that he hadn't taken in days at the time of the arrest, and was experiencing withdrawal symptoms. A defense expert testified that what the officer and passenger observed was consistent with withdrawal from an opiate. The trial court convicted Richardson and he appealed. The Second District Court of Appeals reversed, finding that there was no evidence to connect the use of hydrocodone to Richardson's impairment.

In a 4-3 decision the Supreme Court of Ohio reversed and sided with the trial court. It noted that the responding officer was experienced and had training in impaired-driver detection. Justice O'Neill and Justice Pfeiffer dissented and maintained that the officer was not qualified to opine on the drug or its effects. Justice Lanzinger in her dissent asserted that the case was fact-specific and thus not appropriate for a broad pronouncement of law. *State v. Richardson*, Slip. Op. No. 2016-Ohio-8448.

Police Officers May Only be Liable for Injuries to Third Parties Sustained During a High-Speed Chase if They Acted Maliciously, in Bad Faith, or in a Wanton or Reckless Manner

The case arose from a July, 2011 incident when Pamela Argabrite was injured during a police chase involving officers from the Miami Township police department and the Montgomery County Sheriff's Department. The chase ended when the suspect struck Ms. Argabrite's vehicle head-on, killing the suspect and injuring her. The trial court granted summary judgment in favor of the officers based on *Whitfield v. Dayton*, 167 Ohio App. 3d 172, 2006-Ohio-2917 (2d Dist.), which held that "when police officers pursue a fleeing violator who injures a third party, the officers' pursuit is not the proximate cause of the injuries unless their conduct was outrageous or extreme." The Second District affirmed, applying the rule from *Whitfield*.



The Supreme Court found that the trial court and the Second Appellate District erred in applying the incorrect legal standard. The Supreme Court looked to the plain language of R.C. Chapter 2744, which prescribes the circumstances under which a political subdivision and its employees are liable in tort. Specifically, R.C. 2744.03(A)(6)(b) states that employees of the political subdivision are immune from liability unless the employees' acts or omissions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." This is the standard that should be applied to determine if an officer has liability in tort, and not the "outrageous or extreme" standard articulated by *Whitfield*. However, the Supreme Court affirmed summary judgment for the officers, reasoning that, as a matter of law, they did not act with malicious purpose, in bad faith, or in a wanton and reckless manner. Justice French, writing for the majority, noted that "no other public employee faces the potential danger, violence or unique statutory responsibilities a law-enforcement officer faces."

Chief Justice O'Connor, Justice O'Donnell, and Justice Lanzinger (with an opinion) joined in the majority opinion. Justice Kennedy concurred in judgment only and Justices Pfeifer and O'Neill concurred in part and dissented in part; each of these justices wrote separate opinions. *Argabrite v. Neer*, Slip Op. No. 2016-Ohio-8374.

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